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In the Supreme Court of the United States

October Term, 1982

JOHN DEAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court erred in failing to declare a mistrial and ordering a new trial for prosecutorial misconduct in questioning petitioner about non-existent prior criminal drug smuggling conduct.

2. Whether the trial court erred in denying petitioner's motion to suppress evidence obtained pursuant to Civil Summons proceeding in *United States v. Dean*, C79-646M and in violation of petitioner's rights.

3. Whether wages earned by the taxpayer may lawfully be taxed by Congress in their entirety.

4. Whether the trial court erred in failing to grant petitioner's motions to dismiss for lack of jurisdiction and venue.

5. Whether the trial courts denial of petitioner's proposed jury instructions precluded defendant from arguing his theory of the case.

6. Whether the trial court and the U.S. Magistrate erred in failing to appoint an attorney at government expense.

7. Whether the trial court abused its discretion in sentencing petitioner to the maximum allowed by law and by requiring petitioner to post both cost and appeal bonds.

In the Supreme Court of the United States

October Term, 1982

No. 81-1506

JOHN DEAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, JOHN DEAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The unreported opinions of the Court of Appeals for the Ninth Circuit appear in the Appendix herein. No opinion was rendered by the District Court for the Western District of Washington.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 9, 1982, time unknown. An order denying petitioner's motion for rehearing and suggestion for rehearing *en banc* was entered on July 27, 1982, time unknown, and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under Title 26 United States Code Section 7203 and Title 28 United States Code Section 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

ORDERS 1a-3a

CONSTITUTION
- Article 1 Section 9 ..... 4a
- Amendment XVI 4a

FEDERAL STATUTES
- Title 18 U.S.C., Section 3006A 5a
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- Rule 5, F.R. Cr. Proc 8a
- Rule 12, F.R. Cr. Proc 9a
- Rule 404(b) F.R. Evid 10a
- Rule 609 F.R. Evid 10a

STATEMENT OF THE CASE

This matter stems from a conviction of failure to file an income tax return for 1976 pursuant to Title 26, United States Code, Section 7203. Judgment of conviction was entered on August 7, 1981 and modified on August 14, 1981. Petitioner, JOHN L. DEAN, was sentenced to one (1) year imprisonment, fined $10,000.00 and ordered to pay costs of prosecution in the amount of $4,617.25. An appeal bond was set in the amount of $10,000.00. The petitioner filed his notice of appeal from the original judgment on August 7, 1981 and the docket fee was paid on August 13, 1981. An amended Notice of Appeal was filed on August 14, 1981. The petitioner posted the security bond of $14,617.25 and the appeal bond of $10,000.00

Petitioner, JOHN L. DEAN, was charged by information with failure to file an income tax return for the year 1976 in violation of Title 26 United States Code, Section 7203. A summons was sent to Mr. Dean and on April 22, 1981, he appeared pro se, before United States Magistrate ROBERT COOPER. (Initial hearing – TR 1.) At this initial hearing, petitioner requested the appointment of counsel. (Initial hearing – TR3.) At that time the arraignment was continued until Wednesday, April 29, 1981 and the defendant was released on his own personal recognizance pending the arraignment (Initial Hearing – TR 5). On April 29, 1981, Mr. Dean appeared again before United States Magistrate Cooper and again, requested appointment of counsel. (Arraignment – TR 1-3.) Magistrate Cooper declined to appoint an attorney at government expense and thereafter conducted the arraignment of the defendant. (Arraignment – TR 5.) Magistrate Cooper entered a plea of not guilty on behalf of the petitioner because the petitioner did not wish to enter a plea without the assistance of counsel (Arraignment – TR 4). On April 30, 1981, the petitioner filed numerous objections to proceedings in the United States District Court, including objection to the jurisdiction of the Court.

On May 19, 1981, Judge Tanner conducted a status conference with the government with Mr. Dean present. Mr. Dean, again, appeared pro se and he again requested the

appointment of counsel, and again objected to any hearings without benefit of counsel. (Status hearing – TR 2-5.) At this hearing, Mr. Dean advised the Court that he had the financial ability to pay for an attorney but had been unable to obtain an attorney. (Status hearing – TR 6.) The Court also noted that petitioner, pro se, had filed a motion to dismiss and a motion to suppress evidence. (Status hearing – TR 9.)

Thereafter, the undersigned was appointed by the Court as counsel. On June 15, 1981, a jury was selected and the case continued until June 18, 1981. The petitioner renewed all of his previously made motions and these motions were denied. (TR – 34-35.)

The government presented evidence that Mr. Dean filed an income tax return which contained a request for a refund. (Plaintiff's Exhibit 9.) The government contended that petitioner received over $55,000.00 gross income. (Trial – TR 154-155.) (Plaintiff's Exhibit 18.) The government denied receiving a copy of the petitioner's W-2 attachment. (Defendant's Exhibit A & B.) The income tax return for 1976 introduced by the government as Exhibit 9 had staple holes at the place indicated for the attachment of W-2 forms. Mr. Fernelius, the IRS tax examiner, testified that if W-2 forms had been attached to the form 1040 for 1976 that he would have been able to calculate a tax liability for the petitioner and that the defendant's filing would have constituted a return. (Trial – TR 85.)

The petitioner's 1976 tax return indicated that in April, 1977, he was a resident of Olympia, Washington. (Plaintiff's Exhibit 9.) The Trans-World Airlines W-2, which was introduced as petitioner's Exhibit A, indicated that the petitioner's W-2 forms were mailed to Olympia, Washington within the District after the end of the calendar year 1976. The petitioner testified that he did not move to Olympia, Washington until after the first of the year, 1977 (Trial – TR 200). The government introduced a deed indicating that he had purchased property in Olympia, Washington in November, 1976 (Plaintiff's Exhibit 25) (Trial – TR 195). Petitioner testified that he lived outside of the Western District of Washington through the entire calendar year 1976 (Trial – TR 200). The 1040 forms introduced by the

government as Exhibits 1, 2, 3 and 7 covering the calendar years 1972, 1973, 1974 and 1975 reflect that Mr. Dean was a resident of Kansas City, Missouri on the date those tax returns were prepared. There was no evidence that the petitioner lived or was a resident of the Western District of Washington during the calendar year 1976.

The petitioner testified at length about his reasons for asserting his objections on the Form 1040. (Trial – TR 172-200.) He carefully entered his objection in each block as he thought the law required, attached W-2 forms to the return and mailed it.

The second question asked of petitioner on cross examination was "Were you smuggling narcotics?" (Trial – TR 237.) Petitioner's objection was sutained but his motion for mistrial was not granted (Trial TR – 237-238; 258-261.) At the hearing on petitioner's mistrial motion, the government admitted that it had "no indication that Mr. Dean was involved in other criminal activities." (Trial – TR 263.)

The jury returned a verdict of guilty. (Polling – TR 1.) Immediately after the polling of the jury, petitioner moved for a continuance of his personal recognizance bond pending date for sentencing. The trial Court refused to consider such a bond and refused to permit the petitioner a hearing on the bail issue. (Polling – TR 4-5.) The trial Court refused even to permit filing a bond, but insisted that cash be deposited. (Polling – TR 4.) After the sentencing on August 7, 1981, and the cost hearing on August 14, 1981, the Court required petitioner to file additional cost bonds in the total sum of $14,617.25. (Sentencing – TR 22-23.)

REASONS FOR GRANTING THE WRIT

I

The second question asked of petitioner on cross examination was whether he smuggled narcotics (Trial – TR 237.) There was no attempt by the government's attorney to lay a foundation or otherwise establish conditions for proper impeachment. Both Federal Rules of Evidence 404(b) and 609 permit introduction of otherwise impermissible evidence of prior wrongdoing. Neither rule was complied with nor relied

upon in this case by the government. In *Thurmond v. United States*, 316 F.2d 205 (9th Cir. 1963), this Court ordered a new trial for a similar error. At page 206 the Court stated:

> "It was error to suggest by leading questions on cross-examination of appellant that he had participated in specific acts of criminal conduct, not resulting in convictions, other than those with which he was charged."

See also, *United States v. Excoto-Nieto*, 417 F.2d 623 (9th Cir. 1969).

In *United States v. Perry*, 512 F.2d 805 (6th Cir., 1975) the Sixth Circuit reversed a conviction of forgery for the prosecutor's question about "the Dixie Mafia." See also, *United States v. Brown*, 519 F.2d 1368 (6th Cir., 1975); *United States v. Dow*, 457 F.2d 246 (7th Cir. 1972); *United States v. Dean*, 435 F.2d 1 (6th Cir. 1970).

A cautionary instruction was requested by petitioner but only after the trial Court refused to order a new trial. However, such instructions will not cure the error. *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed2d 1250 (1959); *Thurmond v. United States*, 316 F.2d 205 (9th Cir. 1963).

In this case, the prosecutorial misconduct denied petitioner a fair trial. The petitioner's principal defense was on the factual question of whether his conduct was or was not willful. The prosecutor's initiation of cross-examination by such a highly prejudicial question can only be understood as an unauthorized and unfair attack on petitioner's credibility and character. The fact of petitioner's filing a 1976 form 1040 and the contents of the form were not disputed by petitioner. The critical factual issue was whether petitioner held an honest belief that he was lawfully entitled to file in the fashion he did. The combination of the early reference to narcotics and smuggling, the "teasing" out of defendant the fact of Mr. Garner's gambling activities and the general use of ridicule in the examination of petitioner about his political beliefs reveals the prosecutor's true motive for injecting the fictional narcotics and smuggling activities early in his cross-examination. That motive was to prejudice the petitioner before the jury and thus establish that petitioner could not be believed as to the honesty of his convictions that he filled out

the 1040 form as required by his understanding of the *Garner* decision. If, as the government contends, the question was designed to meet a 5th Amendment challenge, then why was no foundation laid and why were these two highly emotional ideas introduced at the very outset of the cross-examination. The simple fact of the matter is that petitioner was intentionally "smeared" at the outset of his cross-examination by a wholly indefensible suggestion that violated petitioner's constitutional right to a fair trial.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) the Supreme Court held that before an error can be harmless, the reviewing Court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Id* at 87 S.Ct. 828; *U.S. v. Fernandez*, 497 F.2d 730 (9th Cir. 1974). In order to find petitioner guilty of the crime charged in this case, the jury had to disbelieve the petitioner on two crucial factual issues: 1) the honesty of his belief that he followed the law in the *Garner* decision in filling out his form 1040 and 2) that he did not attach W-2 forms to the Form 1040. On both issues the form 1040 which was introduced in evidence substantiated and corroborated petitioner's factual contention. Each line of the Form 1040 left without figures was carefully footnoted to petitioner's objections and staple holes were present in the form at the place indicated where W-2 forms were to be attached. Thus, the credibility of petitioner was a critical issue. The tactics of the prosecution are not excusable under the harmless error rule, beyond a reasonable doubt.

The judgment of conviction should be reversed and the case remanded for a new trial.

II

Petitioner filed a motion to suppress evidence obtained through a Civil Summons proceeding in *U.S. v. Samson*, Docket No., Civil No. C79-646M, United States District Court for the Western District of Washington at Seattle. Extensive findings of fact and conclusions of law and orders have been filed in that matter relating to discovery of petitioner's financial data during the calendar year 1976. The evidence is

uncontradicted that petitioner was first interrogated in 1977 by an IRS criminal investigator and given *Miranda* warnings. The prior history of IRS criminal investigations in 1977, followed by the 1979 Civil Summons proceeding, followed by the 1980 criminal charges filed in this case clearly indicated that petitioner's repeated request for a suppression hearing should have been granted by the District Court. The petitioner's motion was filed on May 12, 1981 and conforms with Rule 12 of the Federal Rules of Criminal Procedure. The trial Court denied petitioner a hearing and refused to suppress any evidence. When the government responded to petitioner Dean's motion, it appended the Findings entered by Magistrate Weinberg in Civil No. C79-646M. Finding No. 13 acknowledges that the Civil Summons proceeding was "being conducted for two purposes: determining [Mr. Dean's] civil tax liability and ascertaining any criminal prosecution potential." In view of the fact that plaintiff's exhibit 9 (petitioner's 1976 Form 1040) contains a demand for a refund of more than the statutorily required amount of gross income required to trigger the filing requirement, the joint motive asserted by the government in the Civil Summons proceeding is clearly a deception. While petitioner's Form 1040 for 1976 contained few figures it was sufficient to advise the government of his demand for a refund. This is not a tax fraud or other case where determination of tax liability is important. The existence of the statutorily required amount of gross income is the only important fact the government needed in view of the petitioner's Form 1040 for 1976. That form provided them with that fact. Accordingly, it is clear that the government knew everything it needed to know to make its determination whether to file this criminal action *before* it even commenced its Summons enforcement case. Accordingly, the trial Court should have held a hearing and suppressed all evidence obtained by the government pursuant to it prior Civil Summons enforcement proceeding. See *United States v. La Salle National Bank*, 437 U.S. 298 47 L.Ed.2d 221 (1978). In flagrant cases of government overreaching, dismissal of indictment is required. *U.S. v. Dahlstrum*, 493 F.Supp. 966 (C.D. Ca. 1980). Accordingly this Court should reverse the petitioner's conviction.

III

Since the introduction of income tax provisions in the United States near the beginning of this century, controversy has surrounded both the concept and the scope of the term income. Review of early income tax provisions by this Court resulted in rulings striking down these provisions as violative of Article I Section 9 of the United States Constitution. See, *Pollock V. Farmers Loan and Trust*, 158 U.S. 601 (1895). Amendment XVI to the U.S. Consitution and laws promulgated thereunder were intended to alleviate the likelihood that a tax on income would be held to be a direct tax. Yet, in *Eisner v. Macomber*, 252 U.S. 189 (1919), an early post-sixteenth Amendment case, this Court recognized that a direct tax remained unconstitutional by the terms of Amendment XVI, regardless of Congressional intent.

> In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter may also have proper effect, it becomes essential to distinguish between what is and what is not "income"... Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution...

Id at 206.

The Court continued by defining income:

> [W]e find little to add to the succinct definition adopted in the two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence v. Howbert*, 231 U.S. 399, 415; *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185)— "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets

Id at 207.

Thus defined, the "proper effect" to be given income tax provisions is one reflective of the Constitutional prohibition of direct taxes. That is, the income to be taxed is the gain derived from the labor, and not the labor itself. The same fundamental concept is clearly set forth in the Sixteenth

Amendment – "incomes, *from* whatever *source derived*" . . . ,
Id

> *"Derived-from-capital"*; - "The *gain-derived*-from-capital," etc. Here we have the essential matter: *not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *"derived,"* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal; – that is income derived from property. Nothing else answers this description.

Id

Just as taxes directly laid upon capital would violate Article I Section 9 of the Constitution, so do taxes laid directly upon labor. The United States cannot, therefore, tax wages earned in entirety without violating the Constitution. If the United States may properly tax wages earned at all, it may tax only the gain "derived from" labor. Currently, earned wages are taxed in entirety, thus imposing the equivalent of a direct tax on labor in violation of Article I Section IX of the U.S. Constitution. While acknowledging the existence of valuation problems in determining the "gain derived from" labor, the problems must be faced before taxation of wages earned will accord with the letter and spirit of the Constitution.

Based on the above, the judgment of conviction should be reversed and the case remanded for a new trial.

IV

This Court lacks jurisdiction to hear this case because the Congress failed to specifically grant subject matter jurisdiction over criminal violations to the federal Courts. Title 18, United States Code, Section 3231 states in part that District Courts have "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." On its face, it appears to grant jurisdiction to try petitioner for a violation of Title 26 U.S.C. Section 7203. However, 18 U.S.C. Section 3231 grants original jurisdiction over only those crimes contained in Title 18 United States

Code. Congress never intended Section 3231 to cover violations of Title 26.

In 1948, Title 18 U.S.C. Section 3231 was created primarily out of Title 18 U.S.C. Section 546 and 547, 1940 ed. Section 546 of the 1940 version of Title 18 limited the reach of the statute to "the crimes and offenses defined *in this title.*" (Emphasis supplied.) Arguably, the alteration of this language to that of the present Title 18 U.S.C. Section 3231 effected to change in the coverage of the statute. However, the Court should note that the reviser's note states that the first sentence was rewritten to preserve provisions of the 1940 ed. Title 28 U.S.C. Section 371(1) which provided that the District Courts had original jurisdiction of all offenses against the laws of the United States "exclusive of the State Courts." The provision of this former statute in Title 28 that gave District Courts "exclusive" jurisdiction was not then incorporated in the 1940 ed. of Title 18 U.S.C., Section 546. Sections 546 and 547 dealt *separately* with "exclusive" jurisdiction (Section 546) and "concurrent" jurisdiction (Section 547). Arguably, the consolidation of the 1940 ed. of Title 28 U.S.C. Section 371(1) with Title 18 U.S.C. 546 and 547 into one new Title 18 U.S.C. 3231 retained the exclusive jurisdiction of U.S. District Courts feature as well as limiting the reach of the statute to Title 18 offenses as before. Accordingly, although counsel has found no decision squarely resolving this matter, the proper interpretation of the current Title 18 U.S.C. Section 3231 is to limit its reach to only Title 18 offenses. Accordingly, since there are no other statutes conferring original jurisdiction over Title 26 U.S.C. Section 7203, this District Court was without jurisdiction to hear this case and petitioner's conviction must be reversed.

Lack of Venue

At the initial hearing in this matter the petitioner filed a document entitled "Appearance by Defendant" in which he stated in part that he did "not concede that this Court is the proper Court to hear this unsupported charge." Thereafter at every hearing the petitioner objected to jurisdiction of the Court. It is apparent from the "Appearance by Defendant" as

well as by paragraph 5 of petitioner's "Memoranda in Support of All Motions to Date" filed in District Court on May 13, 1981 that petitioner properly objected to the venue of the Court. Rule 18 of the Federal Rules of Criminal Procedure provides in part that "except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

The only evidence of petitioner's presence within the State of Washington during calendar year 1976 was a deed to certain real property. Petitioner testified that he did not move from Missouri to Washington until after January 1, 1977. Accordingly, the alleged "offense" could not have been committed within the venue of the Western District of Washington. Proving proper venue is part of the government's case without which there can be no conviction. *U.S. v. Mancino*, 179 F. Supp. 897 (Dist. Ct. N.Y. 1959); *U.S. v. Flaxman*, 304 F. Supp. 1301 (Dist. Ct. N.Y. 1969).

Petitioner requested in his proposed instruction 3 that the jury be instructed on this issue but the trial Court refused to give the instruction. Erroneously, the trial Court failed to instruct the jury on the disputed venue issue, notwithstanding that proper instructions were proposed. However, the Court should note that in *United States v. Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974) the Court seems to say that the District in which the return was mailed is the district of proper venue. However, the *Bettenhausen* case is distinguished from this in that Mr. Dean earned no income in the Western District of Washington where the return was mailed and did not reside there until *after* the end of the calendar year. While the petitioner's return was prepared and mailed from Olympia, Washington, these acts occurred in April, 1977, after the ye in question. It is undisputed that the applicable IRS regulations required petitioner to file his 1976 return as if he still lived in Kansas City, Missouri and that district was the proper district in which venue lay. Moreover, since the regulations place geographic requirements on the filing of the return and since Title 26 U.S.C. Section 7302 makes unlawful the failure to file pursuant to those regulations, the proof that the acts were done within the district alleged in the information is jurisdictional as well as relating to venue. The

information is this case alleged that the acts occurred or failed to occur in the Western District of Washington. The trial Court, however, as noted above, refused to instruct on the disputed jurisdictional issue notwithstanding that proper instructions were proposed. For this reason this Court should reverse the defendant-appellant's conviction.

V

As stated in *U.S. v. Kenny*, 645 F.2d 1323 (9th Cir. 1981) at 1337:

> [11] "When a defendant's jury instructions have been refused, the following principles apply. The jury must be instructed as to the defense theory of the case, but the exact language proposed by the defendant need not be used, and it is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory. The court examines the instructions as a whole, rather than merely viewing the failure to give any one instruction. *United States v. Sibley*, 595 F.2d 1162, 1165 (9th Cir. 1979); *United States v. Kaplan*, 554 F2d 958, 968 (9th Cir. 1977), *cert. denied*, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1978)."

In this case, the Court failed to adequately instruct on the petitioner's theory of the case. Moreover, by giving conflicting instructions concerning "willfullness", the petitioner was denied a fair trial on that defense.

Petitioner's proposed instructions Nos. 5, 6, and 7 accurately reflect the theory of petitioner's defense. These instructions are virtually quotations from Supreme Court decisions. *U.S. v. Bishop*, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973) (Inst. 5); *U.S. v. Garner*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) (Instr. 6 and 7); *U.S. v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927) (Instr. 6). The petitioner repeatedly testified that he relied on the Court decisions and referenced the *Garner* decision in both direct and cross examination. The instructions given by the Court do not adequately adivse the jury that such reliance is a defense to the crime charged.

Moreover, the instructions are intentionally slanted to give

the government's theories of the case an unfair edge in the minds of the jury. The Court instructed the jury with respect to the government's theories relating to "legal tender dollars", 5th Amendment, unconstitutionality of 16th Amendment and protest of income tax. The Court did not instruct on any of the petitioner's theories relating to the proper application of the "willfullness" defense. Indeed, the "Intent and Motive" instruction (given by the Court immediately following the only reference to the "willfullness" defense) amounts to a direction to disregard petitioner's good faith belief that he was following the law announced in *Garner*. This instruction, in the context of this case, amounts to a direction to the jury to return a verdict of guilty.

Similarly, the Court's refusal to include in its instruction a definition of "gain" as requested by defendant denied defendant the right to argue his theory of the case. See *Stepler v. U.S.*, 21 F.Supp. 737 (1921). See generally, *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916); *Eisner v. Macomber*, 252 U.S. 189 (1920).

VI

Defendant repeatedly requested the Court to appoint counsel at government expense. Defendant made his first request at the initial appearance before magistrate Cooper and repeatedly renewed this motion at every subsequent hearing. The defendant took the position that Rule 5 of the Federal Rules of Criminal Procedure not only does not limit appointment of counsel to indigency cases but supplements his constitutional right to counsel and authorizes appointment of counsel at government expense. Counsel has been able to find no cases directly on point which resolve the arguable disparity between Rule 5 of the Federal Rules of Criminal Procedure and the provisions of Title 18 United States Code, Section 3006A.

VII

Following the jury verdict, three hearings were held regarding petitioner's bail status, sentencing and cost bond. The net result of these hearings is that petitioner has been

required to post over $24,000.00 in cash and bond and faces the maximum sentence authorized for this violation of one year in jail and over $14,000.00 fine and costs. Counsel realizes that the trial Court is vested with great discretion in sentencing convicted defendants. *U.S. v. Hernandez-Salazar*, 471 F.2d 1209 9th Cir. (1970). However, in view of the fact that this is petitioner's first conviction of anything but minor traffic offenses, the sentence imposed is an abuse of discretion.

Counsel urges the Court to review the pre-sentence report and the record of the hearing following the polling of the jury (Polling – TR 3-6) and the two other post-trial hearings of August 7 and August 14, 1981. These hearings reflect: 1) Findings by the trial Court with respect to the possibility of flight that are totally unfounded in the records (Polling – TR 5); 2) Denial of hearing on petitioner's living arrangements and ties to the community (Polling – TR 5); 3) Requirement of $10,000.00 cash bail pending appeal vice bond for not apparent reason; 4) Imposition of maximum jail sentence for first offender in misdemeanor case; 5) Imposition of both $10,000.00 cash appeal bond and $14,617.25 cost bond.

These actions of the District Court are clearly abusive. And one of them, standing alone, may not call for reversal but taken as a whole clearly require that petitioner's sentence be set aside and the matter remanded to another judge for sentencing.

CONCLUSION

For the reasons noted above, petitioner prays that this Court reverse and remand his conviction.

Respectfully submitted,

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By _____
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	No. 81-1506
Appellee,	)	
	)	DC No. CR 81-14-1
v.	)	
	)	
JOHN L. DEAN	)	
	)	MEMORANDUM
Appellant.	)	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and submitted May 5, 1982

Before: GOODWIN and POOLE, Circuit Judges, and EAST*, District Judge

John L. Dean appeals his conviction for willful failure to file a tax return. His only nonfrivolous point on appeal is whether the misconduct of the prosecutor requires a new trial.

During direct examination Dean made a spurious Fifth Amendment claim as an excuse for refusing to file a proper return. The prosecutor lead off the cross-examination by asking, in exasperation: "Have you been smuggling narcotics?" The question was wholly uncalled for. The prosecutor had neither a good faith belief that the defendant had ever been engaged in smuggling nor any idea that the answer would be other than negative. The trial judge promptly admonished counsel, instructed the jury to disregard the improper question and gave other curative instructions, both at the time and at the end of the trial. While we do not condone that kind of behavior on the part of a representative of the United States Department of Justice, we are satisfied from the record as a

whole that the defendant was given a fair trial and that the trial court correctly dealt with counsel's folly.

The other points briefed and argued have been repeatedly held to be without merit and do not warrant discussion.

Affirmed.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	No. 81-1506
Appellee,	)	
	)	DC No. CR 81-14-1
v.	)	
	)	
JOHN L. DEAN	)	
	)	ORDER
Appellant.	)	

Before: GOODWIN and POOLE, Circuit Judges, and EAST*, District Judge

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The active judges have been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to hear the case en banc. (Fed. R. App. P. 35)

The petition for rehearing and suggestion for rehearing en banc is denied.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	No. 81-1508
Appellee,	)	
	)	DC No. CR 81-14-1
v.	)	
	)	
JOHN L. DEAN	)	
	)	ORDER
Appellant.	)	

GOODWIN, J.

Appellant's motion for stay of mandate is denied.

CONSTITUTIONAL PROVISIONS

ARTICLE I
SECTION 9

[Powers denied Congress.] — [1.] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2.] The priviege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require it.

[3.] No bill of Attainder or ex post facto Law shall be passed.

[4.] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5.] No Tax or Duty shall be laid on Articles exported from any State.

[6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

[7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

AMENDMENT 16

[Income tax.] — The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

FEDERAL STATUTES

Title 18 U.S.C., § 3006A. Adequate representation of defendants

(a) Choice of plan. — Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of libery, any federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h). Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel. — Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization fur-

nishing representation pursuant to the plan. In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and substitution of appointments. — A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation. —

(1) Hourly rate. — Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts. — For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which only felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts. — Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) **Filing claims.** — A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(5) **New trials.** — For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(6) **Proceedings before appellate courts.** — If a person for whom counsel is appointed under this section appeals to an appellate court or petition for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

(e) **Services other than counsel.** —

(1) **Upon request.** — Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) **Without prior request.** — Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.

(3) **Maximum amounts.** — Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

(f) **Receipt of other payments.** — Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

(g) **Discretionary appointments.** — Any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18 may be furnished representation pursuant to the plan whenever the United States magistrat or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

(h) Defender organization. —

(1) Qualifications. — A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) Types of defender organizations. —

(A) Federal Public Defender Organization. — A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the judicial council of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the judicial council of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the judicial council of the circuit at a rate not to exceed the compensaton received by the United States attorney for the district where representation is furnished or, if two district or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the Judicial Council of the Circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys

and other personnel of the organization shall be fixed by the federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The director of the Administrative Office shall submit, similarly as under title 28, United States Code, section 605, and subject to the conditions of that section, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organization. — A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section of its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the coming year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation

and other expenses pursuant to this section.

(i) Rules and reports. — Each district court and judicial council of a circuit shall submit a report on the appointment of

counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations govering the operation of plans formulated under this section.

(j) Appropriations. — There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

(k) Districts included. — The term "district court" as used in this section includes the District Court of the Virgin Islands, the District Court of Guam, and the district courts of the United States crested by chapter 5 of title 28, United States Code.

(l) Applicability in the District of Columbia. — The provisions of this Act, other than subsection (h) of section 1, shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this Act shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

As amended Pub.L. 91-447, § 1, Oct. 14, 1970, 84 Stat. 916; Pub.L. 93-412, § 3, Sept. 3, 1974, 88 Stat. 1093.

Title 18 U.S.C., § 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impale the jurisdiction of the courts of the several States under the laws thereof.

June 25, 1948, c. 645,62 Stat. 826.

Title 26 U.S.C., § 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

As amended June 28, 1968, Pub.L. 90-364, Title I, § 103(e) (5), 82 Stat. 264.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 5
INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor Offenses. If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) Offenses Not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrail release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt dispositon of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States

only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. As amended Feb. 28, 1966, eff. July 1, 1966; April 24, 1972, eff. Oct. 1, 1972.

RULE 12
PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nono contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to the trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrail motions or requests and, if required, a later date of hearing.

(d) Notice by the government of the intention to use evidence.

(1) At the discretion of the government. At the arraignment or as soon thereafter as is practicable the governmemt

may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b) (3) of this rule.

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b) (3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(c) Ruling on motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

Amended April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(11), (12), 89 Stat. 372.

FEDERAL RULES OF EVIDENCE

RULE 404
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RULE 609
IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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